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Something Old, Something New: Busting Some Myths About Statutory Instruments and Brexit

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☞ Brexit; Parliamentary scrutiny; Statutory instruments

One effect of the Statute of Proclamations 1539 was to give Henry VIII the power to make delegated legislation that could amend primary legislation. Almost 500 years later, on 15 May 2012, the word “Brexit” was first used.¹ Delegated legislation and Brexit are both surrounded by myths, and they have been brought together amid a blaze of publicity as the UK prepares to become the first state to leave the EU. This makes it essential that legal scholars and informed citizens gain a greater understanding of what delegated legislation is, what its different forms are and the very wide range of things that they can be used for, how it works, and why it will be so important in the run-up to, and immediately after, Brexit Day.

Delegated legislation has traditionally been an unsung heroine of the UK’s legal system: doing most of the work, not receiving any acclaim, and being properly recognised by only a tiny minority of the population that it serves. Its Cinderella nature is reflected in the way that it is usually taught: most first-year law undergraduates learn that delegated legislation comes in various forms: statutory instruments, Orders in Council, rules, regulations and bylaws (myth 1). They are told that it is scrutinised by Parliament which ensures its democratic accountability (myth 2), and that it covers detailed minutiae (myth 3), so it is drafted by experts, freeing up parliamentary time for more weighty matters. Difficulties may arise if the House of Lords exerts its scrutinising power in such a way as to defeat the will of the elected House of Commons (myth 4), but it can be challenged in the High Court if it is *ultra vires*, thus guaranteeing the sovereignty of Parliament. And there, for the most part, the matter rests: it seems likely that most lawyers rarely think about delegated legislation again.

It is widely acknowledged that the “Leave” campaign’s bus-borne proclamation that a positive outcome to the Brexit referendum would release an additional £350 million per week for the NHS was a myth. Most people who voted “Leave” probably believed the myth, and they probably also thought that Brexit would result in the UK Parliament’s “taking back control” of the UK’s laws (myth 5).

* Stephanie would like to thank the anonymous reviewer of the first version of this article, and Phillip Johnson, who kindly read a later draft, for their helpful comments.

In this article, the titles of Statutory Instruments are cited in accordance with Sweet & Maxwell House Style which omits the initial “The”.

¹ *Oxford Dictionaries*, available online: <https://en.oxforddictionaries.com> [Accessed 19 October 2018].

This article seeks to bust these myths by explaining the way in which delegated legislation made using powers delegated by a UK Public and General Act is classified by those who work with it, and the purposes for which it should be used. It examines the broad scope and minimal parliamentary scrutiny given to delegated legislation, then reviews recent literature on some of the tensions arising from scrutiny. It concludes with a critique of some aspects of the European Union (Withdrawal) Act 2018, arguing that, as the UK devises procedures to deal with the legislative consequences of Brexit, it is essential that legal scholars and journalists—as well as the estimated 8,000 extra civil servants who have been, or will be, recruited to manage the consequences of Brexit²—have a better understanding of why and how to make this important source of law.³

Busting myth 1: the classification of delegated legislation

Most law textbooks state that there are several (the number varies) types of delegated legislation. The statement is usually followed by a list of types of delegated legislation, in which Orders in Council and statutory instruments (SIs) feature as two separate entities. This is not the case: Orders in Council are one form of SI.⁴

The infelicitous wording of the Statutory Instruments Act 1946 s.1(1), whose marginal note reads: “Definition of ‘Statutory Instrument’”, is probably responsible for the widespread belief that Orders in Council are a separate form of delegated legislation from SIs. The full text reads:

- “(1) Where by this Act or any Act passed after the commencement of this Act power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown then, if the power is expressed—
- (a) in the case of a power conferred on His Majesty, to be exercisable by Order in Council;
 - (b) in the case of a power conferred on a Minister of the Crown, to be exercisable by statutory instrument,
- any document by which that power is exercised shall be known as a ‘statutory instrument’ and the provisions of this Act shall apply thereto accordingly.”

This section can be read as offering two definitions of an SI: a document that exercises a power conferred on a Minister of the Crown (para.(b)), or a document that exercises a power conferred on either the monarch or a Minister of the Crown (closing general text). The former interpretation is more visually prominent because

² J. Watts, “Brexit: Government employing up to 8,000 extra civil servants to cope with EU departure. *The Independent*, 31 October 2017.

³ This article was submitted in February 2018, and accepted in March 2018, so it originally referred to the version of the European Union (Withdrawal) Bill that followed the Bill’s second reading in the House of Lords. It was updated in August and September 2018 to reflect amendments that occurred before the Bill became an Act, but includes some criticisms that were made while it was going through Parliament, as these are relevant to some of the arguments.

⁴ S. Pywell, “Untangling the law” (2013) 163(7553) N.L.J. 321. A slightly modified version of this article was published in the *CILEx Journal* (“Disentangling the law” (2013) August *CILExJ* 30), and much of it was reproduced verbatim in M. Zander, *The Law-Making Process*, 7th edn (Oxford: Hart Publishing, 2015), pp.105–107.

of the layout of the section, but it does not withstand scrutiny in the context of *Statutory Instrument Practice*, which identifies five principal forms of SI:

- Orders in Council
- Orders of Council
- regulations
- rules
- orders.⁵

The different purposes for which regulations, rules and orders should be drafted were set out more than 15 years before the Statutory Instruments Act 1946 came into effect on 1 January 1948.⁶

The devolved legislatures in Scotland, Wales and Northern Ireland have separate powers to enable the making of statutory instruments for their respective jurisdictions, but these are not considered further in this article, whose focus is SIs made under the auspices of the UK Parliament.

Orders in Council

The Queen and Privy Council make Orders in Council, which are made when “an SI made by a Minister would be inappropriate. An example might be an Order which transfers ministerial functions ... or where the Order is in effect a constitutional document”.⁷

Orders in Council may be made in two ways. Some are made as primary legislation under the royal prerogative—the inherent power of the monarch; these are not considered further in this article. Most are made as secondary legislation under the legislative powers delegated by statute to the monarch; these are referred to in this article as “non-prerogative Orders in Council”.

The introductory wording of many recent non-prerogative Orders in Council stresses the monarch’s constitutional role as head of state:

“Her Majesty, in exercise of the powers conferred upon Her by [specified sections of specified Acts] is pleased, by and with the advice of Her Privy Council, to order, and it is ordered, as follows: ...”.

Non-prerogative Orders in Council are the most difficult form of SI to find. Those made since 2000 are available via the Privy Council website, but this has no search facility, and lists only the dates of Privy Council meetings. Researchers who know the year in which a non-prerogative Order in Council was made have to search the proceedings for all the meetings in that year—which cover a range of topics including lists of appointments to the Privy Council, proclamations about the design of new coins, and orders granting or amending universities’ charters—in order to locate the identifying characteristic of the parenthesised letters “SI” after

⁵ National Archives, *Statutory Instrument Practice: A guide to help you prepare and publish Statutory Instruments and understand the Parliamentary procedures relating to them*, 5th edn (TSO, 2017), para.1.4.1, http://www.legislation.gov.uk/pdfs/StatutoryInstrumentPractice_5th_Edition.pdf [Accessed 19 October 2018].

⁶ Donoughmore Committee, *Report of the Committee on Ministers’ Powers* (HMSO, 1932), Cmd.4060. Some of the material from this report still exists in National Archives, *Statutory Instrument Practice: A guide to help you prepare and publish Statutory Instruments and understand the Parliamentary procedures relating to them*. This description of the use of Orders in Council summarises the effect of the Ministers of the Crown Act 1975 s.1.

⁷ National Archives, *Statutory Instrument Practice: A guide to help you prepare and publish Statutory Instruments and understand the Parliamentary procedures relating to them*, para.1.4.9.

its title. Although they are listed on the *legislation.gov.uk* website, almost all non-prerogative Orders in Council have titles that finish with the word “Order”, rather than “Order in Council”, which makes them impossible to differentiate on sight from ministerial orders.

Two very different examples illustrate the wide range of legislative effects that can be achieved, with minimal publicity, by non-prerogative Orders in Council.

The Trading with the Enemy (Revocation) Order in Council 2011 (SI 2011/2991) revoked two Orders in Council from 1940, and one from 1944. Hyperlinks are provided to two of the three revoked Orders in Council, but both give error messages. The titles of two of the revoked Orders in Council suggest that it was—presumably inadvertently—unlawful for the Channel Islands or the Isle of Man to conduct trade with Germany or its wartime allies from 1940 until 15 December 2011. It is understandable that the revocation of legislation that had been redundant for over 55 years was not the subject of a press release, and it is assumed that those who did business with German organisations in the 66 years between the end of World War II and the revocation of the Orders in Council will not be deemed to have traded with the enemy.

The Proceeds of Crime Act 2002 (External Investigations) Order 2014 (SI 2014/1893) enables the Crown Court to assist other countries’ authorities when they are investigating the proceeds of crimes committed within their jurisdiction. If the proceeds are believed to be in the UK, the Crown Court may issue search and seizure warrants, as well as account-monitoring orders, disclosure orders and confiscation orders. This SI creates four new criminal offences in England, Wales and Northern Ireland. The offences are broadly similar to existing offences relating to the proceeds of crimes committed in those three countries, and involve penalties ranging from a fine to five years’ imprisonment. These offences were created without the involvement of either House of Parliament, and with no publicity and, as noted above, their origin is very hard to trace.

Orders of Council

Orders of Council give statutory effect to rules or regulations made by the regulatory or governing bodies of professions, principally those involving clinicians, healthcare workers, paramedics, vets, pharmacists, and complementary therapists such as chiropractors and osteopaths. Orders of Council are made by “The Lords of Her Majesty’s Most Honourable Privy Council”; they give the Privy Council oversight of professional bodies without involving the monarch. Because of their tightly defined remits, no examples of this type of SI are considered in this article.

Regulations

Since March 2014, regulations have been the recommended means by which Ministers should exercise their delegated law-making powers.⁸ Regulations are used to make substantive laws, and they are the form of SI with which law students are most familiar: most answers to LLB exam questions about the advantages of

⁸ National Archives, *Statutory Instrument Practice: A guide to help you prepare and publish Statutory Instruments and understand the Parliamentary procedures relating to them*, para.1.4.2.

delegated legislation would include a statement that it is very detailed and technical, so MPs cannot be expected to have the time or expertise to determine its content.

This is true principally of regulations, whose potential scope is extremely wide. Topics covered by regulations made between 19 and 30 December 2017 include individuals' exposure to ionisation from medical imaging and radiological treatments,⁹ four additional categories of prison work to be covered by criminal legal aid,¹⁰ a ban on the manufacture and sale of toiletries containing microbeads,¹¹ and flying restrictions over Hyde Park.¹²

The purpose and effect of regulations can be opaque to the reader, because they are often drafted to specify details rather than principles, or to make minor amendments to pre-existing legislation. The following is the first substantive provision of the Wireless Telegraphy (Ultra-Wideband Equipment) (Exemption) (Amendment) Regulations 2018 (SI 2018/44) reg.2(2):

“In regulation 3 of the principal Regulations, in the definition of ‘total radiated power spectral density’—

- (a) for the words ‘contained within harmonised standard EN302 435-1**(b)**’ substitute ‘contained within harmonised standard ETSIEN302 065-4**(b)**’; and
- (b) omit footnote **(b)** and insert the following footnote **(b)**—

‘(b)ETSI EN 302 065-4 (version 1.1.1) published in July 2017.’”.

It is impossible to work out what this might mean without working back through other pieces of legislation, and in some cases there will be numerous sets of amending regulations, rendering it very difficult to work out what the law currently is.

The Telecommunications Restriction Orders (Custodial Institutions) Regulations 2016 (SI 2016/830) are another case in point. They concern the county court's power to make a telecommunications restriction order, identify the people who may apply for an order, specify the notice and information that must be provided by applicants, and provide for costs orders, appeals, restrictions on disclosure, and powers to discharge or vary orders. As it is considered bad practice to restate primary legislation in SIs—because repetition is futile, and inconsistency would be problematic—the SI at no point explains what a telecommunications restriction order is.

A crucial difference between these two sets of regulations is that the latter is accompanied by an explanatory memorandum (EM), and the former is not. The EM accompanying SI 2016/830 points out that the Serious Crime Act 2015 s.80 “requires telecommunication providers to prevent or restrict the use of communication devices by persons detained in custodial institutions”, making it clear that the aim of the regulations is to specify the procedures for disabling prisoners' mobile phones. The interception, in August 2016, of drones carrying phones, chargers and drugs near HMP Pentonville, and CCTV footage of a similar

⁹ Ionising Radiation (Medical Exposure) Regulations 2017 (SI 2017/1322).

¹⁰ Criminal Legal Aid (Amendment) Regulations 2017 (SI 2017/1319).

¹¹ Environmental Protection (Microbeads) (England) Regulations 2017 (SI 2017/1312).

¹² Air Navigation (Restriction of Flying) (Hyde Park) Regulations 2017 (SI 2017/1300).

successful operation at HMP Wandsworth in April 2016,¹³ is proof that—if prisoners are not to be able to communicate with their nefarious associates while they are incarcerated—the enforcement of stringent technological controls is desirable. Regulations are ideal to legislate in this level of detail about an uncontroversial political aim.

Rules

Rules are procedural in nature: they set out how things should be done, rather than what should be done. They are relatively rare: in 2015–17, between 2.4 per cent and 2.8 per cent of SIs included the word “Rules”.¹⁴ The Civil Procedure Rules 1998 (SI 1998/3132) substantially reformed the practice of civil justice in England and Wales, and many sets of rules—including about 80 per cent of those made in 2017—relate to the administration of justice. Other rules are less far-reaching, governing matters such as firearms,¹⁵ insolvency,¹⁶ and appeals against the suspension of churchwardens.¹⁷

Orders

Orders are used to exercise executive power, and to take judicial and quasi-judicial decisions. Orders can be used to effect temporary changes, such as closing roads while works are carried out, or more lasting measures, such as amending teachers’ pay and conditions. Some forms of order have been created to serve specific purposes, and three forms of particular interest—remedial orders, legislative reform orders, and public bodies orders—are discussed below.

Remedial orders (ROs) would be of purely historical interest if, as has been mooted, the Human Rights Act 1998 were repealed and replaced with a British Bill of Rights. Section 10 of the Act provides that, if a court declares any legislative provision to be incompatible with the European Convention on Human Rights, or if the European Court of Human Rights rules that a person’s Convention rights have been infringed, a Minister may make an RO. The Sexual Offences Act 2003 (Remedial Order) 2012 (SI 2012/1883) was made after the Supreme Court’s declaration, in *R. (on the application of F) v Secretary of State for the Home Department*,¹⁸ that the requirement for some convicted sex offenders to report indefinitely to police stations was incompatible with their right to private and family life under art.8 of the Convention.

Legislative reform orders (LROs) were created by the Legislative and Regulatory Reform Act 2006, which has been described as being perhaps “the most egregious example in recent years” of the “Henry VIII” clauses that enable primary legislation to be amended or repealed by delegated instrument.¹⁹ Section 1 of the 2006 Act permits a Minister to make an LRO to “reduce a legislative burden”, which includes

¹³ *BBC News*, “Drones seized over HMP Pentonville carrying drugs and phones” (22 August 2016), <http://www.bbc.co.uk/news/uk-england-london-37152665> [Accessed 19 October 2018].

¹⁴ See <http://www.legislation.gov.uk> [Accessed 19 October 2018].

¹⁵ Firearms (Amendment) Rules 2017 (SI 2017/1281).

¹⁶ Insolvency (England and Wales) and Insolvency (Scotland) (Miscellaneous Amendments) Rules 2017 (SI 2017/1115).

¹⁷ Suspension Appeals (Churchwardens etc.) Rules 2016 (SI 2016/816).

¹⁸ *R. (on the application of F) v Secretary of State for the Home Department* [2010] UKSC 17; [2011] 1 A.C. 331.

¹⁹ Zander, *The Law-Making Process* (2015), p. 109.

“an administrative inconvenience”—a surprisingly low threshold requirement for a departure from the usual legislative checks and balances that exist in a parliamentary democracy. Despite widespread concern that these provisions could usher in a blizzard of untrammelled ministerial law-making, only 36 UK-wide LROs were made in 2007–2017.²⁰ Legislative reform orders were onerous to produce, and the Deregulation Act 2015 abolished “legislative burdens” in a wide range of specified areas, thereby diminishing the need for LROs.

Public bodies orders (PBOs) were created by the Public Bodies Act 2011, which took 14 months of parliamentary debate. They were intended to provide the paraffin for the highly publicised “bonfire of the quangos” by authorising Ministers to abolish, merge or modify the 285 public bodies specified in the Act’s five Schedules. The Secondary Legislation Scrutiny Committee (SLSC) made a detailed submission about PBOs to the Public Administration and Constitutional Affairs Committee in 2017. It noted that, by the end of 2016, 32 PBOs had affected 53 public bodies, which is just over 10 per cent of the 495 quangos that the Government had originally identified “for action”.²¹ The discrepancy does not mean that all the quangos in question have survived; the bodies that would have been the subjects of the anticipated-but-never-made PBOs were expected to be dealt under other forms of legislation, or by voluntary arrangements.²² The SLSC criticised the Government for inadequately preparing the policy, wasting resources, and causing distress to many of the public bodies, some of which were subsequently reinstated.²³ The cost savings brought about by PBOs by the end of 2014 were estimated at £126.5 million; the exact amount is unclear because the savings forecast under PBOs were presented in three different ways.²⁴ The SLSC tersely concluded that: “*a PBO is not the ‘quick fix’ that paragraph 96 [of the Government’s 2016 Assessment of the Public Bodies Act 2011] suggests*” (original emphasis).²⁵

Remedial orders provide a simple and straightforward way of ensuring that the UK meets its obligations under the Convention, but LROs and PBOs are examples of political expediency that has gone wrong, causing concern among commentators, unnecessary fear among those who work in public bodies, and fiscal confusion in Parliament.

Busting myth 2: parliamentary scrutiny of statutory instruments

The range and scope of SIs—which can include the creation of criminal offences—make it essential that they are subjected to thorough parliamentary

²⁰ See <http://www.legislation.gov.uk> [Accessed 19 October 2018].

²¹ House of Lords Secondary Legislation Scrutiny Committee, *Submission to PACAC of 1 February 2017 responding to the Government Assessment Document on the Post-Legislative Review of the Public Bodies Act 2011* (TSO, 2017), <http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/post-legislative-assessment-of-the-public-bodies-act-2011.pdf> [Accessed 19 October 2018]. The committee is ambiguous on this point. The middle column of the table on p.5 (para.23) identifies 32 orders “plus one later withdrawn”, but the accompanying text (para.25) states “ultimately only 31 (53%) of the 58 orders originally proposed have been laid”.

²² Secondary Legislation Scrutiny Committee, *Special Report: Public Bodies Act 2011: three years on* (TSO, 2014), <https://publications.parliament.uk/pa/ld201415/ldselect/ldsecleg/73/7303.htm> [Accessed 18 October 2018].

²³ Secondary Legislation Scrutiny Committee, *Submission to PACAC of 1 February 2017 responding to the Government Assessment Document on the Post-Legislative Review of the Public Bodies Act 2011*.

²⁴ Secondary Legislation Scrutiny Committee, *Special Report: Public Bodies Act 2011: three years on*.

²⁵ Secondary Legislation Scrutiny Committee, *Submission to PACAC of 1 February 2017 responding to the Government Assessment Document on the Post-Legislative Review of the Public Bodies Act 2011*, p.7.

scrutiny. It is therefore regrettable that such scrutiny is at best minimal, and at worst non-existent.

The scrutiny of delegated legislation is not shared equally between the two Houses of Parliament. Two of the three parliamentary committees that routinely work with secondary legislation—the SLSC²⁶ and the Delegated Powers and Regulatory Reform Committee (DPRRC)²⁷—are composed entirely of members of the House of Lords, with members of only the Joint Committee on Statutory Instruments (JCSI)²⁸ being drawn from both Houses. The workload of the SLSC is heavy; it scrutinises an annual average of around 1,000 SIs.²⁹ The Regulatory Reform Committee, which consists solely of MPs, scrutinises draft legislative reform orders, a role that is carried out in the Lords by the DPRRC.³⁰ The Hansard Society, a charity that works to promote democracy and strengthen parliaments, has proposed that the Lords’ established procedures should remain unchanged, but that the House of Commons should shoulder its share of the burden by creating a permanent Delegated Legislation Scrutiny Committee (DLSC) that would consist of up to 15 MPs reflecting the political composition of the Commons. The DLSC would be chaired by a member of the Opposition, supported by sub-committees that included MPs with relevant expertise, and assisted by a secretariat and advisers.³¹ Unless there is a dramatic change in the attention paid to the charity’s publications—in 2017, it was reiterating many of the criticisms of the scrutiny process that it had made in 2014—the DLSC seems destined to remain nothing more than a thoughtful proposal made by the experts of whom, according to Michael Gove, the people of Britain have “had enough”.

There are five basic scrutiny procedures that apply to SIs: unlaidd; laidd; the negative—or annulment—resolution procedure (of which there are two forms); the affirmative resolution procedure (of which there are three forms); and more rigorous procedures, some of which are “super-affirmative” (of which there are 11 forms).³² Every parent Act must specify the procedure that applies to SIs made using the powers that it delegates. The detail of these procedures is labyrinthine, but there are some aspects of scrutiny that merit examination because they epitomise the “rubber-stamping” nature of the processes that most SIs undergo before becoming law. Irrespective of the procedure used, it is almost always the case that

²⁶ The SLSC considers the policy merits of all SIs, and “draws to the attention of the House” any that are politically or legally important, or that affect public policy (S. Patrick, *Scrutiny of Delegated Legislation in Relation to the UK’s Withdrawal from the European Union* (London: The Constitution Society, 2017)).

²⁷ The DPRRC examines all Bills passing through the Lords, and reports on inappropriate delegations of legislative power or levels of scrutiny. (Patrick, *Scrutiny of Delegated Legislation in Relation to the UK’s Withdrawal from the European Union* (2017)).

²⁸ The JCSI draws the attention of both Houses to an SI if it does not consider that ministerial power is being carried out *intra vires* and appropriately, and that SIs are drafted correctly; it does not comment on the merits of policy or the content of SIs. (Patrick, *Scrutiny of Delegated Legislation in Relation to the UK’s Withdrawal from the European Union* (2017)).

²⁹ *Guidance for Departments Submitting Statutory Instruments to the Secondary Legislation Scrutiny Committee* (TSO, 2015), https://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/SLSC_Guidance_for_Departments_submitting_July15.pdf [Accessed 19 October 2018].

³⁰ UK Parliament, “Role Regulatory Reform Committee”, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/regulatory-reform-committee/role/> [Accessed 19 October 2018].

³¹ R. Fox, J. Blackwell and B. Fowler, *Taking Back Control for Brexit and Beyond* (London: The Hansard Society, 2017).

³² House of Lords Select Committee on the Constitution, *Delegated Legislation and Parliament: A response to the Strathclyde Review: 9th Report of Session 2015–16* (TSO, 2016), <https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/116/11602.htm> [Accessed 19 October 2018]. T. Galbraith, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons* (TSO, 2015), Cm.9177, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486790/53088_Cm_9177_Web_Accessible.pdf [Accessed 19 October 2018].

both Houses can only accept or reject an SI in its entirety—there is no scope for proposing amendments. This has been appropriately described as a “take it or leave it proposition [that] does nothing to encourage effective scrutiny and Member engagement with the issues”.³³

An SI will normally be unlaidd only if it is non-contentious; the most common occurrences of this are SIs that bring Acts into effect. An unlaidd SI that has general application may be scrutinised by the JCSI, and it will become law on a date specified within it.³⁴

An SI is laidd when the Clerk of the Parliaments receives the House of Lords’ copy of it, and the Votes and Proceedings Office receives the House of Commons’ copy.³⁵ Peers are notified of the laying by the Minutes of Proceedings of the House of Lords, and MPs are informed by the Votes and Proceedings of the House of Commons. A laidd SI becomes law on the specified date without any parliamentary proceedings.³⁶

The negative procedure applies to around three-quarters of the SIs that are laidd in any session of Parliament.³⁷ An SI that is subject to this procedure becomes law without any debate unless either House objects to it within 40 days of its being laidd.³⁸ In 2016–17, only one SI was subject to an annulment motion in the House of Lords.³⁹ In the Commons, any MP may attempt to trigger a debate by tabling an early day motion (EDM) to “pray” that the SI be annulled.⁴⁰ This procedure is rarely used: in 2016–17, only 21 out of 537 negative SIs were the subject of such prayers.⁴¹ Because the government decides whether an EDM is debated, many prayers go unheard, and some SIs are debated after the end of the 40-day scrutiny period specified in the Statutory Instruments Act 1946 s.5(1), which means that their revocation is not automatic. These procedural constraints effectively give the government power to decide whether the House of Commons has any opportunity to debate SIs⁴²; it is perhaps unsurprising that the executive rarely subjects its own legislation to scrutiny.

Under the affirmative procedure, each House must receive five copies of an SI, and an EM, so that the Chief Whip and Leader of each House can decide whether the SI should be the subject of a debate by the whole House, rather than the default position of its being considered only by the JCSI and the SLSC and DPRRC (in the Lords) or a delegated legislation committee (DLC)—a committee set up to

³³ R. Fox and J. Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (London: The Hansard Society, 2014), Executive Summary, p.6.

³⁴ Galbraith, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons*.

³⁵ Office of Public Sector Information, *Statutory Instrument Practice: A manual for those concerned with the preparation of statutory instruments and the parliamentary procedures relating to them*, 4th edn (Office of Public Sector Information, 2006).

³⁶ National Archives, *Statutory Instrument Practice: A guide to help you prepare and publish Statutory Instruments and understand the Parliamentary procedures relating to them*, para.2.8.8.

³⁷ Select Committee on the Constitution, *Delegated Legislation and Parliament: A response to the Strathclyde Review: 9th Report of Session 2015–16*.

³⁸ Statutory Instruments Act 1946 s.5(1).

³⁹ House of Lords, *Statistics on Business and Membership: Session 2016–17* (TSO, 2017), <https://www.parliament.uk/documents/publications-records/House-of-Lords-Publications/Records-activities-and-membership/Business-membership-statistics/HL-Sessional-Statistics-on-Business-and-Membership-2016-17.pdf> [Accessed 19 October 2018].

⁴⁰ Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017).

⁴¹ House of Commons, *Sessional Returns: Session 2016–17: Delegated Legislation and Legislative Reform Orders* (TSO, 2017), https://publications.parliament.uk/pa/cm/201719/csession/1/108.htm#_idTextAnchor032 [Accessed 19 October 2018].

⁴² Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017).

debate one or more SIs—in the Commons. Since the Whips and Leaders of both Houses are appointed by the Prime Minister, this is another opportunity for the government to limit the effectiveness of the scrutiny process.⁴³ In the House of Lords, no vote on an SI may be taken until a report has been received from the JCSI and, in practice, motions to approve SIs are not debated in the House until the SLSC has also reported. In the Commons, however, some affirmative SIs are debated before the JCSI has scrutinised them, which means that time and expertise are wasted, and most SIs are agreed to, on a day following the DLC meeting, without a division, so most voting MPs are approving something about which they are likely to know very little.⁴⁴ In 2016–17, 141 SIs were subject to approval motions in the House of Lords, and 166 SIs were subject to the affirmative procedure in the House of Commons.⁴⁵

Legislative reform orders made under the Legislative and Regulatory Reform Act 2006 s.18 are covered by a “super-affirmative” procedure that enables the Regulatory Reform Committee to comment on them, and then their amended form can be laid before Parliament. Public bodies orders are subject to an “enhanced affirmative procedure” introduced by the Public Bodies Act 2011 ss.10–11. These procedures typically require consultation periods and ministerial statements before an SI is approved by Parliament; they are inevitably more involved than the negative and affirmative procedures, and their detail is beyond the scope of this article.

There are inconsistencies in the titles given to certain types of SI. This causes difficulties for researchers whose starting-point is *legislation.gov.uk*, where a search for “Public Bodies Abolition Order” in “UK Statutory Instruments” yields only 22 of the 32 PBOs that have actually been made. More importantly, it is problematic for Parliament, leading the SLSC to describe itself as “surprised to have to make the point” that: “*It should be a general rule for all orders following an enhanced or non-standard procedure that the relevant Act is referenced in the title to make their distinctive procedure clear*” (original emphasis).⁴⁶

A nugatory amount of parliamentary time and attention is devoted to SIs, suggesting that the epithet “secondary” is very apt for delegated legislation. In 2016–17, the House of Lords as a whole (excluding its committees) spent 43 hours 51 minutes (4.7 per cent of sitting time) on matters relating to delegated legislation in 2016–17.⁴⁷ In the same period, the House of Commons spent 5 hours 29 minutes (0.5 per cent of its time sitting in the House) on motions for the approval of SIs; there were no motions to annul or revoke SIs.⁴⁸ Even the DLCs’ debates are often rushed: they may last for up to 90 minutes, but the time limit is rarely reached—in 2015–16, the average length of these debates was 26 minutes—and MPs are told to be non-participative, and to deal with their constituency correspondence, during meetings.⁴⁹

⁴³ Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017).

⁴⁴ Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017).

⁴⁵ House of Lords, *Statistics on Business and Membership: Session 2016–17*; House of Commons, *Sessional Returns: Session 2016–17: Delegated Legislation and Legislative Reform Orders*.

⁴⁶ Secondary Legislation Scrutiny Committee, *Submission to PACAC of 1 February 2017 responding to the Government Assessment Document on the Post-Legislative Review of the Public Bodies Act 2011*, p.3.

⁴⁷ House of Lords, *Statistics on Business and Membership: Session 2016–17*.

⁴⁸ House of Commons, *Sessional Returns: Session 2016–17: Sittings of the House* (TSO, 2017), <https://publications.parliament.uk/pa/cm/201719/csession/1/1.pdf> [Accessed 19 October 2018].

⁴⁹ Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017).

In July 2016 and July 2017 the SLSC discussed with three senior civil servants some of the problems, arising from circumstances beyond their own control, that parliamentary committees face when they are scrutinising delegated legislation.⁵⁰ Concerns were raised about the quality of drafting, as well as the comprehensibility of the supporting EMs and impact assessments that committees receive in support of secondary legislation.⁵¹ Unlike primary legislation, SIs are subject to no centralised political oversight, although every government department now has a “senior responsible owner” and a Minister to assume overall responsibility for SIs.⁵² The SLSC noted its concern that SIs were sometimes laid only three days, instead of the prescribed 21, before they were required—typically by a deadline in an EU Directive—to become law, and that the supporting information was sometimes not available at that point; these difficulties should be ameliorated by the Parliamentary Business and Legislation Committee’s forthcoming attempts to try to ensure a smoother flow of SIs with full supporting documentation.⁵³ Efforts to improve the quality of drafting included giving better, differentiated, training to the lawyers who draft SIs and the civil servants who draft EMs.⁵⁴ It was thought that most of the 100 or so lawyers had already been trained, but it was not possible to estimate what percentage of civil servants involved in drafting EMs had been trained, because it was unknown how many are employed on this work.⁵⁵ The civil service is, despite some disconcerting gaps in its knowledge, making real efforts to improve the quality of SIs and their supporting documents but, since scrutiny of an SI cannot be delayed until a comprehensive and comprehensible EM is provided, it cannot hope to resolve the underlying constitutional and procedural problems identified in this article.

The Hansard Society has proposed, in some detail, amendments to the scrutiny system. The putative DLSC would bring SIs to the attention of the House for reasons including legal or political importance, public policy, and imperfect achievement of its objectives, and some Brexit-related SIs would be subject to a new, strengthened scrutiny procedure, in whose design the authors have:

“sought to draw on the best aspects of the 11 existing variants, while being cognisant of the volume, time and capacity constraints that must be taken into account when considering the Bill [now the European Union (Withdrawal) Act 2018].”⁵⁶

⁵⁰ Elizabeth Gardiner, First Parliamentary Counsel and Permanent Secretary in the Cabinet Office, Jonathan Jones, Treasury Solicitor and Permanent Secretary at the Government Legal Service, and Chris Wormald, Head of Government Policy Profession and Permanent Secretary in the Department of Health. At the 2017 session, the last-named had become Sir Chris Wormald.

⁵¹ Secondary Legislation Scrutiny Committee, *The Quality of Information Provided in Support of Secondary Legislation* (TSO, 2016), <http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/CORRECTED-TRANSCRIPT-120716-Gardiner-et-al.pdf> [Accessed 19 October 2018].

⁵² Secondary Legislation Scrutiny Committee, *Oral evidence: Quality of information provided in support of secondary legislation* (TSO, 2017), p.6, <http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/CORRECTED-TRANSCRIPT-SLSC-QI-inquiry-12-09-17-Gardiner-et-al.pdf> [Accessed 19 October 2018].

⁵³ Secondary Legislation Scrutiny Committee, *Oral evidence: Quality of information provided in support of secondary legislation*.

⁵⁴ The “core” training on drafting lasts three days, and some new forms of training, including an introductory training course (of unspecified length), were introduced in 2017.

⁵⁵ Secondary Legislation Scrutiny Committee, *Oral evidence: Quality of information provided in support of secondary legislation*.

⁵⁶ Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017), p.57.

These improvements would come at a price: the DLSC's estimated annual cost of more than £800,000, including resourcing its sub-committees, would be only partially offset by the abolition of DLCs—of which there were 150 during 2016–17—and the House of Commons Regulatory Reform Committee.⁵⁷ Some people would consider that a price worth paying for greater democratic involvement in law-making.

There is no credible literature contending that the current system of scrutinising SIs is clear, comprehensible, appropriate or democratic yet, unless reforms are implemented, the UK Parliament's oversight of SIs will remain, in the words of various commentators: “negligible; entirely theoretical”,⁵⁸ “palpably unsatisfactory”,⁵⁹ and “woefully inadequate”.⁶⁰ These excoriating criticisms, some made many years ago, support the Hansard Society's assertion that “MPs have now largely withdrawn from trying to hold the government to account for delegated legislation”.⁶¹ Placing untrammelled law-making power in the hands of government Ministers bypasses the system of checks and balances upon which the doctrine of separation of powers depends.

Busting myth 3: the scope of statutory instruments

Although it is entirely appropriate that purely technical issues are determined by experts, and that tedious procedural matters are drawn up by Ministers, some delegated legislation makes politically significant changes to the law. This is a long-standing problem: in 1929, 19 years before the first SIs were made, the Lord Chief Justice of England, Lord Hewart, lamented the wide-ranging law-making powers that Parliament, perhaps without much detailed consideration, had given the Minister of Health, under the Rating and Valuation Act 1925 s.67, to “remove any difficulty” in the application of the Act.⁶²

Much more recently, the Environmental Protection (Microbeads) (England) Regulations 2017 (SI 2017/1312) were made under the Environmental Protection Act 1990 s.140, which permits the Secretary of State to make regulations governing the import, use, supply and storage of anything that he considers polluting or harmful to humans, animals or plants. The Secretary of State must publish a notice in the *London Gazette* specifying the effect of proposed new regulations, the date on which they will come into force, and where a full draft may be inspected during a consultation period of at least 14 days. The criminal offences created by these regulations, which include using microbeads in the manufacture of any rinse-off personal care product, may not have a maximum penalty that exceeds two years' imprisonment. This constraint, coupled with the minimalist requirements for prior display of the regulations, does little to assuage concern that the ability to create criminal offences has been given to one person, while the 28-year gap between the Act and the SI exemplifies the concern that “the power to make regulations

⁵⁷ Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017).

⁵⁸ BBC Radio 4, *Today*, Lord Judge being interviewed by John Humphrys (30 January 2018).

⁵⁹ House of Commons Select Committee on Procedure, *First Report: Delegated Legislation* (TSO, 2000), para.53, <https://publications.parliament.uk/pa/cm199900/cmselect/cmproced/48/4803.htm#a3> [Accessed 19 October 2018].

⁶⁰ Select Committee on Liaison, *Liaison—First Report* (TSO, 2000), para.24, <https://publications.parliament.uk/pa/cm199900/cmselect/cmliain/300/30003.htm#a1> [Accessed 23 February 2018].

⁶¹ Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017), p.31.

⁶² G. Hewart, *The New Despotism* (London: Ernest Benn Ltd, 1929).

goes on for ever”.⁶³ It is axiomatic that the laws of any state should be accessible to its citizens, and the maxim *ignorantia juris non excusat* precludes a court from regarding ignorance of the law as exculpatory. Although secondary legislation is published on the freely accessible website *legislation.gov.uk*, it usually arrives there without any publicity, and its volume is such that only the most dedicated fans of legal minutiae will read it. This means that almost all defendants who commit offences created by SIs genuinely would be unable to identify or locate the criminal laws that they have broken.

Another Act that delegates a startling range of law-making power is the Childcare Act 2016. Section 1(1) imposes on the Secretary of State a duty to provide 30 hours of free childcare per week, for 38 weeks each year, for qualifying children whose parents are working. The great majority of the Act, from s.1(4) onwards, empowers the Secretary of State to make regulations, whose scope extends to creating criminal offences relating to disclosure about whether a child qualifies for free childcare (para.2(2)(h)), imposing a maximum penalty of £3,000 for the criminal offences (para.2(5)(a)), changing the amount of the maximum penalty (para.2(6)), and “conferring a discretion on any person” (para.4(2)(a)); additionally, (s)he may “amend, repeal or revoke any provision made by or under an Act (whenever passed or made)” (para.4(2)(d)). All regulations under this Act are subject only to the negative or affirmative procedure, despite the fact that some of them will create criminal offences attracting significant penalties.

The DPRRC noted that the Childcare Bill “is almost entirely enabling”, and described it as containing “virtually nothing of substance beyond the vague ‘mission statement’”.⁶⁴ The committee’s recommendation that the affirmative procedure should be applied to all the powers delegated by s.1 was partly implemented, but its scathing criticism that “the purpose of an Act is to change the law, not to ‘send a message’” appears to have fallen on deaf executive ears.⁶⁵ The powers delegated to the Secretary of State under the Childcare Act are so broad that it is almost impossible to imagine any of the resulting delegated legislation being declared *ultra vires*. The vagueness of the drafting eliminates effective judicial control over the exercise of delegated powers—which, given the lack of scrutiny given to most SIs by Parliament, means that both theoretical types of check on the executive’s delegated law-making powers are largely ineffective.

Busting myth 4: House versus House?

The fact that no members of the House of Lords are elected leads to a widely held view that the upper House has no right to interfere with the government’s legislative aims. When primary legislation is in issue, the Parliament Acts 1911 and 1949 provide that, although the House of Lords may delay the passing of a Bill, it cannot block it completely. No such democracy-friendly safeguards exist in respect of secondary legislation, and they had never been thought necessary, because the

⁶³ BBC Radio 4, *Today*, Lord Judge being interviewed by John Humphrys (30 January 2018).

⁶⁴ House of Lords Delegated Powers and Regulatory Reform Committee, *Second Report of Session 2015–16: Childcare Bill [HL]* [(TSO, 2015), paras 1, 8, <https://publications.parliament.uk/pa/ld201516/ldselect/lddelreg/12/1203.htm#a1> [Accessed 6 December 2017].

⁶⁵ Delegated Powers and Regulatory Reform Committee, *Second Report of Session 2015–16: Childcare Bill [HL]*, para.10.

Lords “voluntarily blunts [its] influence by its reluctance to reject SIs”: since 1950, the House of Lords has rejected only five SIs.⁶⁶

This laissez-faire attitude changed in 2015, when the Conservative Government sought to further its “austerity agenda” by raising the financial thresholds at which people become eligible to receive tax credits. A public outcry—including a petition signed by over 300,000 people—ensued, and the Chancellor of the Exchequer, George Osborne, stated that around 10 per cent of families would be made worse off by the changes. The Government’s desired changes were included in the draft of the Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015, which were approved by the House of Commons by 325 votes to 290 on 15 September, and debated in the House of Lords on 26 October. The Lords voted, by 289 votes to 272, to delay its consideration of the SI until the Government had (i) provided a detailed response to an analysis by the Institute for Fiscal Studies on the effects of the proposed changes, (ii) explained how it might mitigate those effects, and (iii) committed to providing transitional protection for all affected people for a minimum of three years. This vote meant that the SI could not become law immediately, thereby delaying one of the executive’s fiscal aims.

The Government’s response was to order Lord Strathclyde, a Conservative hereditary peer and former Leader of the House of Lords, to “conduct a review of statutory instruments and to consider how more certainty and clarity could be brought to their passage through Parliament”.⁶⁷ The resulting 9,387-word review, which was produced in eight weeks, characterised the central issue as a conflict between the two Houses of Parliament, and it proposed three ways in which the House of Lords’ powers could be amended so as to prevent its being able to block measures that had been approved by the Commons. Its final sentence included the words “I believe it would be appropriate for the Government to take steps to ensure that Bills contain an appropriate level of detail and that too much is not left for implementation by statutory instrument”.⁶⁸ If this recommendation were followed, proposals to effect significant policy changes could be debated in detail in both Houses of Parliament, rather than generally being scrutinised only by committees whose power is limited to reporting their concerns. This would restore secondary legislation to its proper role.

During the first four months of 2016, the SLSC, the DPRRC and the Constitution Committee⁶⁹ (CC) published responses to the Strathclyde Review. Although no peer serves on more than one of the committees, all three expressed very similar views, asserting that the review had focused on the wrong question: the issue was not the balance of power between the two Houses of Parliament; rather, it was the one between the executive and Parliament, which “lies at the heart of our constitution”.⁷⁰ This imbalance would be less problematic if delegated powers were used appropriately: “the issue is not the delegation of powers in principle but the

⁶⁶ Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017); Fox and Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (2014), Executive Summary, p.7.

⁶⁷ Galbraith, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons*, p.3.

⁶⁸ Galbraith, *Strathclyde Review: Secondary legislation and the primacy of the House of Commons*, p.23.

⁶⁹ The Constitution Committee is a committee of the House of Lords. Its remit is to scrutinise all Public Bills for issues of constitutional importance, and to investigate constitutional issues.

⁷⁰ Select Committee on the Constitution, *Delegated Legislation and Parliament: A response to the Strathclyde Review: 9th Report of Session 2015–16: Summary* (TSO, 2016), final paragraph, <https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/116/11603.htm> [Accessed 19 October 2018].

scope and nature of the delegations sought by governments”,⁷¹ and it is inappropriate that

“delegated powers in primary legislation have increasingly been drafted in broad and poorly-defined language that has permitted successive governments to use delegated legislation to address issues of policy and principle, rather than points of an administrative or technical nature”.⁷²

The Hansard Society has pointed out that:

“The time and resource dedicated to the Strathclyde Review ... stands in marked contrast to the reluctance of successive governments to tackle real problems of democratic accountability in the House of Commons.”⁷³

In November 2016, the Government announced that it did not plan to legislate to curtail the Lords’ power to block SIs, but warned that the decision might be reconsidered if the House did not exercise “discipline and self-regulation”.⁷⁴ Lord Strathclyde stated that the government was “appealing to the very best instincts of the House of Lords”, which included recognising the limits of its power, and using that power “only in the most exceptional of circumstances”.⁷⁵ The unexpected outcome of the Brexit referendum, and consequent change of government, had resulted in a re-setting of political priorities, and Lord Strathclyde pointed out that the options outlined in his report remained available if the House of Lords decided to use its veto. Despite the House of Commons’ “defeat” on tax credit thresholds, it has been pointed out that, if an SI is rejected by either House, the government can lay an almost identical SI very rapidly, so it is inaccurate to refer to the House of Lords as having “a power of veto” over SIs; a more accurate term is “a power to reject”.⁷⁶

In an echo of Lord Hewart’s 1929 concerns, Lord Rowlands commented in 2016 that, 50 years previously, he had witnessed “a raging debate about what should be in primary and what should be in secondary legislation”; he noted that the same debate had been re-ignited by the Strathclyde review, and asked whether some real progress could be made. The three senior servants from whom the SLSC was taking evidence responded that “it is within Parliament’s gift to decide on the balance between primary and secondary legislation”, although parliamentary counsel and lawyers provide informal advice to Ministers about where the balance might be.⁷⁷

Lord Rowlands’ remarks were fully justified: even the self-defined “modernising” New Labour Governments of 1997–2010—which brought about major

⁷¹ House of Lords Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review: 25th report of 2016–17* (TSO, 2016), p.10, <https://publications.parliament.uk/pa/ld201516/ldselect/lddelreg/119/119.pdf> [Accessed 22 February 2018].

⁷² Select Committee on the Constitution, 2016. *Delegated Legislation and Parliament: A response to the Strathclyde Review: 9th Report of Session 2015–16*, p.7.

⁷³ Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017), p.8.

⁷⁴ BBC News, “Plans to curb House of Lords powers dropped” (17 November 2016), <http://www.bbc.co.uk/news/uk-politics-38008315> [Accessed 18 October 2018].

⁷⁵ BBC Radio 4, *The World at One*, Lord Strathclyde being interviewed.

⁷⁶ Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation* (TSO, 2016), para.30, <https://publications.parliament.uk/pa/ld201516/ldselect/ldsecleg/128/128.pdf> [Accessed 19 October 2018].

⁷⁷ Secondary Legislation Scrutiny Committee, *The Quality of Information Provided in Support of Secondary Legislation*, pp.17–20.

constitutional reforms, including redefining the office of the Lord Chancellor, significantly changing the composition of the House of Lords, curtailing the royal prerogative, and effecting devolution in the UK—did nothing to grasp the nettle of burgeoning executive power. Indeed, Tony Blair used one SI—made entirely outside parliamentary procedures—to permit himself to appoint up to three publicly funded political appointees to the Prime Minister’s Office for the duration of the Parliament without invoking the normal civil service recruitment procedure,⁷⁸ before appointing Alistair Campbell and Jonathan Power to the influential posts of Downing Street Press Officer and Chief of Staff respectively. The three subsequent governments, although of political persuasions opposed to that of Blair and Gordon Brown, have shown similar inertia—perhaps it is inevitable that, since most of the matters discussed by Parliament are initiated by the government, any executive will be reluctant to curtail its own powers by passing legislation to restrict the scope of SIs.

Busting myth 5: control of the UK’s post-Brexit law

The European Union (Withdrawal) Act 2018 s.20(2) provides that the UK will leave the EU at 23:00 GMT on “exit day”, 29 March 2019. At that point, the EU Treaties will cease to have effect, and the parent Act for secondary legislation implementing EU law—the European Communities Act 1972—will be repealed (2018 Act s.1).⁷⁹ Four of the five forms of SI—Orders in Council, orders, rules and regulations—are expressly within the scope of the 1972 Act s.2(2), and any of them may be used to give domestic effect to EU law, subject to conditions specified in Sch.2 of that Act.

European Union Regulations and other measures that were directly applicable in UK law under the 1972 Act s.2(1) will be retained under the 2018 Act s.3. European Union laws that originated in Directives whose deadlines for implementation have passed should already have been incorporated into UK law via Acts of Parliament or secondary legislation. Acts will not need any action, as they will remain in force unless they are individually repealed or amended. The 2018 Act s.2 provides that SIs made under the 1972 Act will continue to have effect, giving the later Act the status of an adoptive parent.

These immediate effects of the Act are fairly uncontroversial; they ensure that UK law will remain stable, preventing such undesirable consequences of Brexit as the sudden lawfulness of including unlimited quantities of volatile organic compounds in paint.⁸⁰ Of much greater potential concern is the fact that all Ministers may, for a period of up to two years after exit day, make such regulations as they consider appropriate to mitigate deficiencies in retained EU law arising from withdrawal (s.8). They may also make regulations to implement the withdrawal

⁷⁸ Civil Service (Amendment) Order in Council 1997; Civil Service Commissioners, *Annual Report 1997–1998* (Civil Service Commissioners, 1998), <http://civilservicecommission.independent.gov.uk/wp-content/uploads/2012/03/Annual%20Report%201997-98.pdf> [Accessed 19 October 2018].

⁷⁹ If Brexit is subject to a transitional agreement, it is likely that the 1972 Act will remain in effect until the end of that period—see M. Elliott and S. Tierney, “Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018” [2019] P.L. 37.

⁸⁰ The Volatile Organic Compounds in Paints, Varnishes and Vehicle Refinishing Products Regulations 2012 (SI 2012/1715) consolidate three previous sets of regulations, and implement Annex III of Directive 2004/42 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain paints and varnishes and vehicle refinishing products and amending Directive 1999/13/EC [2004] OJ L143/87.

agreement by making “any provision that could be made by an Act of Parliament” between the passing of an Act approving the final terms of Brexit and exit day (s.9), and to effect “any such provision as the Minister considers appropriate in consequence of this Act” for up to 10 years after exit day (s.23). The DPRRC considered that the test for making these SIs should have been “whether remedial action is objectively necessary rather than whether the Minister thinks it is appropriate”—the former was specified in para.3.7 of the White Paper that preceded the European Union (Withdrawal) Bill—and that SIs made under these clauses should have been subject to the affirmative procedure and fully explained in the supporting EMs.⁸¹ This test echoes the CC’s recommendation that the Act should have distinguished between necessary amendments to the law, and discretionary amendments to implement policy changes.⁸²

The 2018 Act s.8(5) and (6) provide that the powers to remedy deficiencies include making regulations that do anything that could be done by an Act, including enabling public authorities, “whether or not established for the purpose” to make legislation. This provision—which, before the Act was passed, was regarded as “notable for its width, novelty and uncertainty”—has been described as enabling tertiary legislation, which would not be subject to any parliamentary scrutiny unless it were an SI made under regulations.⁸³ The examples of possible “deficiencies” given in s.8(2) are not exhaustive, and the Hansard Society has expressed concern that “it may be whatever a minister wishes it to mean”.⁸⁴ The extensive powers in ss.8 and 9 are subject to constraints: they may not result in new or increased taxation or fees, apply retrospectively, create a criminal offence for which an adult could receive a punishment of more than two years’ imprisonment, establish a public authority, or affect any provisions related to the Human Rights Act 1998 (ss.8(7) and 9(3)). Additionally, regulations made under s.8 may not be made to implement the withdrawal agreement, or amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998 (s.8(7)). The DPRRC expressed concern, prior to the 2018 Act’s receiving the Royal Assent, that what became s.9(2) contains the classic “Henry VIII power”, but its recommendation that this provision should be removed in its entirety was not implemented.⁸⁵ None of this does anything to negate Lord Judge’s observation that the UK has become “habituated to giving Ministers power”, leading to a risk that the nation will “go to sleep on the dangers of giving the executive too much power”.⁸⁶

Brexit could necessitate additional Orders of Council if the professional bodies chose to amend rules or regulations that had been introduced solely to implement

⁸¹ Delegated Powers and Regulatory Reform Committee, *3rd Report of Session 2017–19* (TSO, 2017), HL Paper 22, Summary, para.1, <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/22/2202.htm> [Accessed 19 October 2018].

⁸² House of Lords Select Committee on the Constitution, *The “Great Repeal Bill” and delegated powers: 9th Report of Session 2016–17* (TSO, 2017), para.37, <https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/123.pdf> [Accessed 19 October 2018].

⁸³ Delegated Powers and Regulatory Reform Committee, *3rd Report of Session 2017–19*, paras 15 and 28.

⁸⁴ Fox, Blackwell and Fowler, *Taking Back Control for Brexit and Beyond* (2017), p. 16.

⁸⁵ Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill: 12th Report of Session 2017–19* (TSO, 2018), HL Paper 73, <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/73/7302.htm> [Accessed 5 February 2018].

⁸⁶ BBC Radio 4, *Today*, Lord Judge being interviewed by John Humphrys (30 January 2018).

the provisions of Directives that were not considered necessary or desirable in the UK.

Orders in Council could be used to clarify the powers of the UK courts and tribunals in respect of matters over which the Court of Justice of the European Union will no longer have jurisdiction. It is impossible to predict whether or how the creation of ministerial orders may be affected by the much-heralded “taking back of control” that will occur at the moment of severance. Before the European Union (Withdrawal) Bill was published, the CC expressed its concern:

“The ‘Great Repeal Bill’ is thus likely to involve a massive transfer of legislative competence from Parliament to government. This raises constitutional concerns of a fundamental nature, concerning as it does the appropriate balance of power between the legislature and executive.”⁸⁷

If Brexit does lead to a plethora of orders, the legislature’s “control” over the UK’s laws—a key plank of the “Leave” campaign—will have increased only negligibly, with significant law-making power passing from the much-maligned “unelected Brussels bureaucrats” to Ministers and their officials. As Lord Judge noted:

“This Bill [now the 2018 Act] is designed to produce the sovereignty of Parliament ... but you don’t exchange the powers given to the EU by reposing them in the hands of Ministers—it’s Parliament that’s sovereign, not the executive.”⁸⁸

Regulations and rules seem bound to proliferate, as measures previously imposed by EU Regulations must continue to apply unless a positive decision is taken to amend or revoke them. In May 2018, Steve Baker, then Parliamentary Under-Secretary of State for Exiting the European Union, told the House of Commons Procedure Committee that the number of SIs that would need to be made under 2018 Act was expected to be very much closer to 800 than 1,000”, but that “things can change”, and Andrea Leadsom, the Leader of the House, added a number of additional SIs “in the low hundreds” would be required by other Brexit-related legislation.⁸⁹

Despite their potentially far-reaching nature, regulations made under the Act will not automatically be subject to super-affirmative procedures. The 2018 Act Sch.7 paras 1 and 10 provide that most SIs made under s.8 or s.9 must be laid before, and approved by resolution of, both Houses of Parliament if they: transfer an EU entity’s law-making power to a UK public authority; relate to a fee for a function carried out by a UK public authority; create, or widen the scope of, a criminal offence; or create or amend a power to legislate. This requirement is waived for regulations under s.8 if a Minister considers that the regulations need to be made so urgently that there is not time to follow the affirmative procedure (Sch.7 para.5(2)). Statutory instruments made under those sections that do not

⁸⁷ House of Lords Select Committee on the Constitution, *The “Great Repeal Bill” and delegated powers: 9th Report of Session 2016–17*, para.47.

⁸⁸ BBC Radio 4, *Today*, Lord Judge being interviewed by John Humphrys (30 January 2018).

⁸⁹ House of Commons Procedure Committee, *Oral evidence: Exiting the European Union: scrutiny of delegated legislation* (TSO, 2018), HC 386, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/procedure-committee/exiting-the-european-union-scrutiny-of-delegated-legislation/oral/82332.html> [Accessed 19 October 2018].

fulfil these criteria will be subject merely to the annulment procedure that has been so little used in the past. Provision has, however, been made for negative SIs to be “sifted” by a new Commons select committee, the European Statutory Instrument Committee. A similar process will be carried out by the Secondary Legislation Scrutiny Committee in the House of Lords, and the sifting committees will have 10 sitting days from the date of the laying of a negative SI to make recommendations on the procedure to which it should be subjected—though the responsible Minister need not accept the recommendation.⁹⁰ Steve Baker estimated that 20–30 per cent of the SIs made under 2018 Act—roughly 32 per week for six months—would be subject to an affirmative procedure.⁹¹ These proposals fall a significant way short of meeting the recommendations of the CC, the Hansard Society, the Institute for Government, and the DPRRC, which suggested that a parliamentary committee should sift all Brexit-related SIs in order to decide which, if any, scrutiny procedure should apply to them.⁹²

The sources on which this article has drawn most heavily—papers by parliamentary committees and the Hansard Society—are the product of many hours of work by people with extensive and detailed knowledge of delegated legislation and parliamentary procedure. Their subject is complex, but their message is coherent and consistent—and compelling if the nation is to avert the risk identified by Lord Judge of “go[ing] to sleep on the dangers of giving the executive too much power”.⁹³ Many of their recommendations have nonetheless gone unheeded by the Government: the heavily criticised Bill has become an Act, albeit with some concessions, and Ministers now have extensive law-making powers that they can exercise according to their own political preferences.

Conclusion

As the UK faces its uncertain future, it is essential that academics, journalists and informed citizens understand what the forms of secondary legislation are and what each should be used for, as well as the difficulties and tensions arising from the way that it is made, and the reforms that are so urgently needed. This understanding will enable informed analysis and criticism of the executive’s use—and potential abuse—of SIs as it revels in its unaccustomed freedom from the shackles of EU law. If the myths persist, however, and nothing significant changes, the outlook is grim: the UK’s post-Brexit legislation will include numerous measures reminiscent of a long-dead uxoricidal monarch whose girth suggested that, like David Davis, he really could have his cake and eat it.⁹⁴

⁹⁰ R. Kelly, *The European Union (Withdrawal) Act 2018: scrutiny of secondary legislation* (Schedule 7) (TSO, 2018), <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8329#fullreport> [Accessed 19 October 2018].

⁹¹ Procedure Committee, *Oral evidence: Exiting the European Union: scrutiny of delegated legislation*.

⁹² Select Committee on the Constitution, *The “Great Repeal Bill” and delegated powers: 9th Report of Session 2016–17*; Patrick, *Scrutiny of Delegated Legislation in Relation to the UK’s Withdrawal from the European Union* (2017); Delegated Powers and Regulatory Reform Committee, *3rd Report of Session 2017–19*; Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill: 12th Report of Session 2017–19*.

⁹³ BBC Radio 4, *Today*, Lord Judge being interviewed by John Humphrys. (30 January 2018).

⁹⁴ This, according to Michel Barnier and Donald Tusk, is myth 6.